Supreme Court, U.S.
FILED

98 108 MAY 22 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

JAMES TRAVIS DAVIS and DONALD L. SHAW,

Petitioners,

versus

GLEN SHAVERS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioners:

R. LESLIE WAYCASTER, JR.
Georgia Bar No. 742500
Counsel of Record for Petitioners

JEFFREY J. DEAN
Georgia Bar No. 006890

WAYCASTER, MORRIS, JOHNSON & DEAN
130 W. King Street
Dalton, Georgia 30720
(706) 226-0100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED FOR REVIEW

Are statements made in a Petition For Recall Application, pursuant to Georgia's Recall Act and which are relied upon by an elected public official as the sole basis for an action in libel, afforded absolute privilege by the "free speech" provisions of the First Amendment of the United States Constitution?

II. LIST OF ALL PARTIES

The caption contains the names of all parties to the proceeding, which are as follows:

A.	Plaintiff	Glen Shavers
B.	Defendants	James Travis Davis
		Donald L. Shaw

III. TABLE OF CONTENTS

		Page
I.	Question Presented For Review	i
II.	List of All Parties	ii
III.	Table of Contents	iii
IV.	Table of Authorities	iv
V.	Opinions Below	1
VI.	Jurisdiction	1
VII.	Applicable Constitutional and Statutory Provisions	1
VIII.	Statement of the Case	2
IX.	Argument and Citation of Authority	5
X.	Conclusion	10
XI.	Appendix	App. 1

IV. TABLE OF AUTHORITIES

Page

CASES

Brooks v. Branch, 262 Ga. 658, 424 S.E. 2d 277 (1993) 6

Collins v. Morris, 263 Ga. 734, 438 S.E. 2d 896 (1994) 6, 7

Cox Enterprises, Inc. v. Carroll City/County Hospital Auth., 247 Ga. 39 (1981) (cites omitted) 10

Garrison v. Louisiana, 379 U.S. 64 (1964) 9

Greenbelt Cooperative Publishing Assn. v. Bresler, 396 U.S. 6 (1970) 9

Mireles v. Waco, 502 U.S. 9 (1991) 8

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 9

Stump v. Sparkman, 435 U.S. 349 (1978) 8

STATUTES

O.C.G.A. § 21-4-5 ..... 2, 5, 8

O.C.G.A. § 21-4-6 ..... 2, 3, 6

O.C.G.A. § 21-4-11 6

O.C.G.A. § 45-10-1 3

O.C.G.A. § 51-5-8 ..... 1, 4, 5

V. OPINIONS BELOW

The decision of the Georgia Supreme Court was reported as *JAMES TRAVIS DAVIS, ET AL V. GLENN SHAVERS*, No. S97G1113 slip op. (Ga. Jan. 4, 1998), 495 S.E. 2d 23 (1998). The Motion for Rehearing was denied on or about February 23, 1998.

VI. JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C.A. § 1257.

VII. APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The applicable provisions of the United States Constitution are as follows:

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

B. The applicable Georgia Statutory provisions are as follows:

1. Official Code of Georgia Annotated § 51-5-8:

> All charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and

material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However false and malicious such charges, allegations, and averments may be, they shall not be deemed libelous.

2. Official Code of Georgia Annotated § 21-4-5:

See full text in Appendix.

3. Official Code of Georgia Annotated § 21-4-6:

See full text in Appendix.

VIII. STATEMENT OF THE CASE

Petitioners were members of a politically active group called "Citizens for Responsible Government". In late 1992 and early 1993 this group became increasingly unhappy with several decisions made by the Mayor and City Councilmen of the city of Ft. Oglethorpe, Georgia, as related to their official duties. Petitioner Donald L. Shaw attended several city council meetings. The group then contacted an attorney, Amy Petulla, regarding their concerns and to discuss a Recall Petition against the Mayor and several Councilmen. After due investigation, pursuant to Official Code of Georgia Annotated § 21-4-5, Ms. Petulla prepared Applications for Recall Petitions against the two (2) city councilmen and the Mayor. One of said Applications was against the Respondent, Glenn Shavers, a city councilman of Ft. Oglethorpe, Georgia. Respondent was, at all relevant times, an elected public official.

The Application contained the following language as the basis for the Application:

> *"[Glenn Shavers] has committed an act or acts of malfeasance while in office [and] has committed an act of misconduct while in office. The facts upon which this recall is based are as follows: He committed an unlawful act and violated parts of II & V of O.C.G.A. § 45-10-1 by illegally passing by resolution an amendment to their retirement system ordinance and causing the payment of unrestored city funds thereunder which benefitted him and others when an ordinance can only be amended by another ordinance, and by voting a fellow councilman, Tracy Bass, two (2) years salary in advance, and by voting at a closed meeting that was required to be open to give a raise to city manager of less than six (6) months." (T. 353, Appellee's Exhibit 1).*

Petitioner, James Travis Davis, was the chairperson for the ***"Citizens for Responsible Government"*** and signed the Applications, which were circulated and signed by approximately three hundred, sixty-two (362) residents of Ft. Oglethorpe, Georgia. Petitioner Shaw then presented the Applications to the Election Superintendent, Don Laster.

Respondent then sought judicial review of the legal sufficiency of the Applications pursuant to Official Code of Georgia Annotated § 21-4-6(a). Following the procedures of Official Code of Georgia Annotated § 21-4-6(f), the Trial Court found that the Application for Recall Petition was legally insufficient and enjoined the election superintendent from issuing Recall Petition forms. The Supreme Court of Georgia affirmed the Trial Court. Neither the Trial Court nor the Supreme Court opined as to the truthfulness of the allegations, but merely held the Applications were factually insufficient to warrant a recall petition. Thereafter, Respondent brought this action

against approximately twenty-three (23) individuals alleging an action for libel based solely upon statements made in the Application for Recall Petition. All twenty-three (23) individuals moved for Summary Judgment. Two (2) individuals were subsequently dismissed and nineteen (19) additional individuals were dismissed on the Motion for Summary Judgment. The case was tried to a jury as to Petitioners Shaw and Davis only. All of the statements contained in the Applications dealt solely with Respondent's official conduct while in office.

Petitioner moved for a directed verdict at the close of Respondent's case on the grounds that the communications complained of were absolutely privileged pursuant to Official Code of Georgia Annotated § 51-5-8, insofar as the recall process should be considered judicial or quasi-judicial in nature. Said motion was denied. Petitioners also made exception to jury charges not given, which dealt with absolute privilege. A verdict and judgment were ultimately awarded in Respondent's favor and Petitioners subsequently filed a Motion for Judgment Notwithstanding the Verdict or For New Trial, which was denied.

The Georgia Court of Appeals reversed on other grounds and granted a new trial, however, the Court of Appeals also determined that the statements contained in the Application for Recall Petition were conditionally, not absolutely, privileged. The Georgia Supreme Court granted Certiorari and affirmed the decision of the Court of Appeals with Presiding Justice Fletcher dissenting. Petitioners' Motion for Reconsideration was denied by the Georgia Supreme Court on February 23, 1998.

IX. ARGUMENT AND CITATION OF AUTHORITY

This Court should grant Certiorari and reverse the Judgment of the Georgia Supreme Court by holding that statements made in an Application For Recall Petition pursuant to a State Recall Act are absolutely privileged by the First Amendment of the United States Constitution.

As Justice Fletcher of the Georgia Supreme Court stated in his dissent:

> *By holding that voters who file a recall application have only a conditional privilege, the majority has unnecessarily eroded the right of recall. Few individuals will sign a recall petition, much less lead a recall effort, when they may face the possibility of a libel action for their participation.* ***Davis et al v. Shavers, No. S97G1113 slip op. (Ga. Jan. 4, 1998), 495 S.E. 2d at 25 (1998) (dissenting opinion).***

In order to accurately address the issue raised herein, this Court must first analyze the applicable provisions of the Georgia Recall Act in light of the First Amendment and determine if the recall procedures are either judicial or quasi-judicial in nature. If so, the statements made under oath in the Application For Recall Petition are absolutely privileged according to O.C.G.A. § 51-5-8.

O.C.G.A. § 21-4-5 sets forth the steps necessary to properly seek an Application for Recall Petition. Essentially, the election superintendent must initially certify the legal sufficiency of the Application. The election superintendent must immediately notify the subject public official. The subject public official may then file a petition in Superior Court applying *"for a review of the*

sufficiency of the ground or grounds for the recall and the fact or facts upon which such ground or grounds are based as set forth in such recall application." O.C.G.A. § 21-4-6(a).

O.C.G.A. § 21-4-6(f) sets out the extent of the review by the Superior Court stating that *"such review shall be limited solely to a review of the legal sufficiency of the recall ground or grounds and the legal sufficiency of the alleged fact or facts upon which such ground or grounds are based as set forth in such Recall Application; and the review of such alleged fact or facts shall be only for the determination of the legal sufficiency of such alleged fact or facts as to form and not as to truth and shall not include discovery or evidentiary hearings."* The Georgia Supreme Court has set forth the standard by which the legal sufficiency of facts alleged in a Recall Application are reviewed. *Brooks v. Branch*, 262 Ga. 658, 424 S.E. 2d 277 (1993). If the Application is deemed to be legally insufficient an appeal to the Supreme Court of Georgia may be made. O.C.G.A. § 21-4-6(g). If an Application is deemed legally sufficient, the recall procedure is continued by issuance of a Recall Petition. If the election superintendent deems it necessary, as part of his duty to determine the legal sufficiency of the Recall Petition itself (after the legal sufficiency of the Application has been made), he may *"examine the registration records maintained by the Board of Registrars, receive evidence and testimony, and require the personal appearance of any person signing such Recall Petition for the purpose of determining that the signers are qualified electors eligible to sign the Recall Petition."* O.C.G.A. § 21-4-11.

In the case of *Collins v. Morris*, 263 Ga. 734, 438 S.E. 2d 896 (1994), the Supreme Court, Honorable Justice Carley, held that the Recall Act was not unconstitutional in

denying elected officials the opportunity for a judicial hearing to determine the truth or falsity of the facts upon which the Recall Application was based. *"[I]t is also true that an official takes his office subject to the conditions imposed by the terms and nature of the political system in which he operates." Collins,* 438 S.E. 2d at 896 (*quoting Eaves v. Harris,* 258 Ga. 1, 3(2)(a), 364 S.E. 2d 854 (1988). *"Recall is a procedure whereby it is the voters themselves who make the ultimate determination as to whether an official should retain his office for the duration of the term to which he was elected." Collins,* 438 S.E. 2d at 897. Justice Carley went on to state that *"the electorate's right of recall derives from our constitution. Georgia Const. of 1983, Art. II Sec. II, Par. IV. 'The peoples right to seek recall of its public officers is a substantial right. . . . ' " Collins,* 438 S.E. 2d at 897 (Citing *Howell v. Tidwell,* 258 Ga. 246, 247(1), 368 S.E. 2d 311 (1988). *"Since recall is a concept which is predicated upon the power of the electorate to remove its elected officials, a statute which provides that the electorate, rather than the judiciary, shall determine the ultimate truth or falsity of the allegations of misconduct is certainly consistent with that concept." Collins,* 438 S.E. 2d at 898.

The Superior Court plays a critical role in reviewing the application. The Court reviews the application and treats its function as if the elected official's challenge is a motion to dismiss. "It is only after the superior court rules that the application is legally sufficient that the sponsors may circulate the recall petition. This judicial review distinguishes this state's procedure from the procedure in other states where appellate courts have found only a conditional or qualified privilege for electors who sign a recall petition." *Davis et al. v. Shavers,* No.

S97G1113, slip op. (Ga., Jan. 26, 1998), 495 S.E. 2d at 26 (1998) (dissenting opinion).

The role of the judiciary in Georgia's Recall Act meets the criteria of "judicial" proceedings under federal law.

The recall procedure is an adjudicative procedure from the initial filing of the application. To be considered a judicial act, the Court should look to the nature of the act itself. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991). There is a two-prong test to determine whether the nature of the act is judicial. *See Stump v. Sparkman*, 435 U.S. 349, 362 (1978). First, the act must be a function normally performed by a judge and the parties must normally expect a judge to perform this act. *Id.* Second, the parties must deal with the judge in this judicial capacity. *Id.* In this case, the elections superintendent makes an initial determination of the legal sufficiency of the allegations contained in the recall application. *See* O.C.G.A. § 21-4-5 (f)-(i). The elections superintendent is performing a task normally expected of a judge, and the parties are dealing with the superintendent in his adjudicatory capacity and the superintendent must certify the legal sufficiency of the petition. Therefore, the initial stages of the recall procedure should be treated as a judicial or quasi-judicial proceeding, even before it reaches the superior court.

A recall application made pursuant to Georgia's Recall Act *must* be considered absolutely privileged. Freedom of expression upon public questions is secured by the First Amendment of the United States Constitution. This Constitutional protection of free speech and press have been fashioned to assure unfettered political and

social change desired by the people. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means is a fundamental principle of the constitutional system. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). Criticism of official conduct of government officials, such as elected city commissioners, does not lose its constitutional protections for speech and presumably because it is effective criticism and hence, diminishes their official reputations. The right to protect these constitutional rights, together with the legislatively provided right to seek judicial review of recall applications in a court of law mandates that recall applications fall within the ambit of absolute privilege. *See, New York Times v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); and *Greenbelt Cooperative Publishing Assn. v. Bresler*, 396 U.S. 6 (1970). The legislature has provided that the subject of the recall application have a judicial remedy to weed out frivolous applications. In order to preserve the integrity of the rights to free political speech, this judicial review must be a public official's only recourse against statements contained in an Application to have that official removed from his public office. Otherwise, the recall system itself is rendered completely useless. To allow a libel action by the subject of the political recall process results in a double penalty to these Appellants. Not only may the Application be dismissed but the applicants may be held liable for statements contained in the Application. In the instant case, it is already sufficient to assume that no member of the Citizens for Responsible Government will ever venture to voice their

political opinions in order to bring about change in their government again. Application of the absolute privilege is necessary to protect uninhibited and robust free political discussion.

Finally, as stated by the Georgia Supreme Court on the issue of free political speech, *"Open discussion of government practices and policies requires that untramelled criticism of government be protected: If critics of government, be they citizens or the press, speak only at the risk of being prosecuted for libel or slander, few will criticize government at all." Cox Enterprises, Inc. v. Carroll City/County Hospital Auth.*, 247 Ga. 39, 41, 273 S.E.2d 841 (1981) (cites omitted). *"Criticism of government is at the very center of the constitutionally protected area of free speech." Id.* at 40. The recall process not only provides the vehicle to criticize, but also to change government. This fundamental right and privilege is so important to the public good, that the individual elected official must surrender this right to sue in order to protect fundamental free political speech for the benefit of the common welfare. Individual citizens of this State must not have their rights of political free speech chilled by the threat of financial and other non-economic burdens of facing litigation as a result of using the recall process. The right of free speech and the protection thereof, far outweighs any detriment which may befall the holder of an elected political office as a result of any recall process.

X. CONCLUSION

The procedures set forth in the Georgia Recall Act involve judicial review and action at various stages of the

recall process sufficient to afford adequate protection to the basic rights of the elected official. These judicial activities make the recall procedures judicial in nature as defined by Federal or State law. As such, these proceedings are entitled to an absolute privilege regarding statements made in recall applications. The importance of First Amendment rights of political free speech concerning elected officials in their elected capacity demands protection against possible monetary retribution in the form of a libel or slander action. If Certiorari is not granted and the Georgia Supreme Court reversed in this case political free speech in its purest and most effective form will be chilled, and perhaps frozen, in Georgia, and across our nation.

For these reasons, this Court should grant Petitioners a Writ of Certiorari and enter a Judgment reversing the decision of the Georgia Supreme Court.

This 22nd day of May, 1998.

Respectfully submitted,

WAYCASTER, MORRIS, JOHNSON & DEAN

R. LESLIE WAYCASTER, JR.
Georgia Bar No.: 742500

JEFFREY J. DEAN
Georgia Bar No.: 006890

130 W. King Street
Dalton, Georgia 30720
(706) 226-0100

In the Supreme Court of Georgia

Decided: JAN 26 1998

S97G1113. DAVIS et al. v. SHAVERS

CARLEY, Justice.

Appellants filed recall applications against certain officials of the City of Fort Oglethorpe, including Glenn Shavers. When those officials sought judicial review of the legal sufficiency of the applications, a trial court found them to be legally insufficient, and this court affirmed. *Davis v. Shavers*, 263 Ga. 785 (439 SE2d 650) (1994). Shavers then brought suit for libel based upon statements made in the recall application against him. A jury returned verdicts against Appellants and the trial court entered judgment on those verdicts. The Court of Appeals held that allegations in a recall application against an elected official are only conditionally, and not absolutely, privileged. *Davis v. Shavers*, 225 Ga. App. 497, 498-500(1) (484 SE2d 243) (1997). However, the Court of Appeals reversed the lower court's judgment based upon errors in the jury charge. *Davis v. Shavers*, 225 Ga. App., supra at 500-502(3). We granted certiorari to determine whether statements in a recall application are conditionally or absolutely privileged. Because we hold that such statements are not absolutely privileged, we affirm the judgment of the Court of Appeals.

As a general rule, statements regarding public figures are not absolutely privileged. Under OCGA § 51-5-7(9) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (84 SC 710, 11 LEd2d 686) (1964), a public official or a candidate

for public office may recover on his libel claim, so long as he demonstrates, by clear and convincing evidence, that the statements complained of were made with actual malice. *Gardner v. Boatright*, 216 Ga. App. 755 (455 SE2d 847) (1995); *Collins v. Cox Enterprises, Inc.*, 215 Ga. App. 679 (452 SE2d 226) (1994); *Thibadeau v. Crane*, 131 Ga. App. 591, 593-594(3) (206 SE2d 609) (1974).

Appellants contend that both public policy and OCGA § 51-5-8 require that statements in recall applications be absolutely privileged. Under OCGA § 51-5-8, "[a]ll charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought," are absolutely privileged. The Court of Appeals has stated that the privilege established by OCGA § 51-5-8 generally includes " 'official court documents' and acts of 'legal process.' [Cits.]" *Williams v. Stepler*, 227 Ga. App. 591, 595(3) (___ SE2d ___) (1997). However, the Recall Act provides for only limited judicial review of the legal sufficiency of the recall application, and prohibits discovery or evidentiary hearings and any determination of the truth of the statements in the application. OCGA § 21-4-6(f). The reasons for these strict limitations is "that the electorate, rather than the judiciary, . . . determine[s] the ultimate truth or falsity of the allegations of misconduct. . . . " *Collins v. Morris*, 263 Ga. 734, 737(1) (438 SE2d 896) (1994). Thus, the recall procedure is not a "judicial" or even "official" procedure, but is political in nature, and the issue to be determined is of a political character. *Gunsul v. Ray*, 45 P2d 248, 249 (Cal. App. 1935). Furthermore, public policy does not support an interpretation of OCGA § 51-5-8 which leaves public officials with no

remedy for allegedly libelous statements made with actual malice in the context of a procedure having only the slightest hint of a judicial nature. To the contrary, it is the policy of this state to restrict the rule of absolute privilege in the law of libel to "narrow and well-defined limits." *Fedderwitz v. Lamb*, 195 Ga. 691, 697 (25 SE2d 414) (1943). Accordingly, while we recognize the importance that criticism of the conduct of public officials plays in the administration of their offices, we conclude that, consistent with *New York Times Co. v. Sullivan*, supra, Appellants are entitled to the protection of a conditional privilege only. *Kramer v. Ferguson*, 41 Cal. Rptr. 61, 64 (Cal. App. 1964). See also *Gunsul v. Ray*, supra. Therefore, the Court of Appeals correctly resolved this issue.

Judgment affirmed. All the Justices concur, except Fletcher, P.J., who dissents.

S97G1113. DAVIS et al. v. SHAVERS.

FLETCHER, Presiding Justice, dissenting.

By holding that voters who file a recall application have only a conditional privilege, the majority has unnecessarily eroded the right of recall. Few individuals will sign a recall petition, much less lead a recall effort, when they may face the possibility of a libel action for their participation. Because the court's opinion will have a chilling effect on political speech and the recall statute already provides sufficient safeguards to protect elected officials from false allegations, I dissent.

1. The Recall Act of 1989 outlines the procedure for seeking recall of public officials.[1] To initiate the process, electors who are registered voters in the official's district file an application for a recall petition with the election superintendent.[2] The application must include a statement of the grounds for recall, a brief statement of the facts on which the grounds are based, and an affidavit by the chairperson and circulator that each person signing the application is an elector and the facts alleged are true.[3] If the election superintendent determines that the application is legally sufficient and the signers are qualified electors, the official certifies the application, issues official recall petition forms, and notifies the targeted public officer that a recall petition has been officially issued for circulation.[4]

---

[1] See OCGA §§ 21-4-1 to 21-4-21.

[2] OCGA § 21-4-5.

[3] OCGA § 21-4-5(b).

[4] OCGA § 21-4-5(f) – (i).

The public officer may then challenge the application by seeking judicial review in superior court.[5] The court reviews both the grounds for recall and their factual basis to determine whether they are legally sufficient.[6] First, the grounds for recall must correspond to the reasons set forth in the statute and may not include discretionary acts.[7] Second, the factual allegations must be stated with reasonable particularity and be more than mere

---

[5] OCGA § 21-4-6(a).

[6] OCGA § 21-4-6(f); see *Collins v. Morris*, 263 Ga. 734, 736 (438 SE2d 896) (1994).

[7] See *Brooks v. Branch*, 262 Ga. 658, 660 (424 SE2d 277) (1993). "Grounds for recall" means:

> (A) That the official has, while holding public office, conducted himself or herself in a manner which relates to and adversely affects the administration of his or her office and adversely affects the rights and interests of the public; and
>
> (B) That the official:
>
> (i) Has committed an act or acts of malfeasance while in office;
>
> (ii) Has violated his or her oath of office;
>
> (iii) Has committed an act of misconduct in office;
>
> (iv) Is guilty of a failure to perform duties prescribed in law; or
>
> (v) Has willfully misused, converted, or misappropriated, without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed.

OCGA § 21-4-3(7).

conclusions.[8] Third, the allegations must specify conduct that would constitute a statutory ground for recall.[9] "[I]t is imperative that the application state with clarity and specificity the facts supporting the grounds for recall such that both the public and the official sought to be recalled are properly notified of the violation alleged to have been committed."[10]

Although the superior court does not hold an evidentiary hearing or determine the truth of the factual allegations, its review is often decisive.[11] In the recall effort that led to this libel action, for example, the application alleged that city council member A. Glenn Shavers violated the Code of Ethics for Government Service in amending the retirement system ordinance by resolution rather than by ordinance and in voting an advance salary to another council member. Despite the specificity of

---

[8] *Hamlett v. Hubbard*, 262 Ga. 279, 279-80 (416 SE2d 732) (1992).

[9] *Brooks v. Branch*, 262 Ga. at 660.

[10] *Davis v. Shavers*, 263 Ga. 785, 786 (439 SE2d 650) (1994).

[11] See *Brooks v. Branch*, 262 Ga. at 660 (affirming superior court decision that applications were legally insufficient because facts alleged were mere conclusions or failed to allege conduct that would constitute a ground for recall); *Hamlett v. Hubbard*, 262 Ga. at 281-82 (agreeing with trial court that four of five alleged facts were legally insufficient but reversing finding that fifth allegation was insufficient); *Steele v. Honea*, 261 Ga. 644, 646 (409 SE2d 652) (1991) (affirming trial court's finding that recall application was legally insufficient); *Howell v. Tidwell*, 258 Ga. 246 (368 SE2d 311) (1988) (affirming trial court's grant of summary judgment to public officials based on multiple signatures of common authorship and the resultant false affidavit).

these allegations, we affirmed the trial court's findings that the recall applications were legally insufficient, concluding that they failed to notify the public why the facts alleged might constitute an act of malfeasance or misconduct in office.[12]

Thus, the superior court plays a critical role in reviewing the application to prevent recall petitions based on bare allegations or notice pleading. In the language of civil procedure, the superior court treats the public official's challenge as a motion to dismiss and, assuming the facts alleged are true, determines whether they are sufficient as a matter of law to state a ground for recall. It is only after the superior court rules that the application is legally sufficient that the sponsors may circulate the recall petition.[13] This judicial review distinguishes this state's procedure from the procedure in other states where appellate courts have found only a conditional or qualified privilege for electors who sign a recall petition.[14]

2. Since the underlying principle for a privilege is public policy,[15] the decision to grant an absolute or conditional privilege requires a balancing of the competing interests. Weighing in favor of the privilege in this case is society's interest in a free and full discussion of the

---

[12] *Davis v. Shavers*, 263 Ga. at 786-87.

[13] OCGA § 21-4-6(g).

[14] See, e.g., *Concerned Members of Intermountain Rural Elec. Ass'n v. District Court*, 713 P2d 923 (Colo. 1986); *Gunsul v. Ray*, 45 P2d 248 (Cal. App. 1935); *State v. Wilson*, 241 P 970 (Wash. 1925).

[15] See *Fedderwitz v. Lamb*, 195 Ga. 691, 696 (25 SE2d 414) (1943).

performance of public officials in their office; opposing the grant of a privilege is the interest of public officials in their personal and professional reputation. Since recall is constitutionally based in Georgia, public policy favors providing a meaningful process.[16]

Both the United States and Georgia Constitutions guarantee free speech.[17] A citizen's right to criticize public officials for their conduct in office is an essential element of this constitutional right.

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[18]

---

[16] See Ga. Const. Art. II, Sec. II, Para. IV.

[17] U.S. Const. amend. I; Ga. Const. Art. I, Sec. I, Para. V.

[18] *Whitney v. California*, 274 U.S. 357, 375-76 (1926) (Brandeis, J., concurring).

Permitting libel actions against individuals involved in the recall process will have a chilling effect on the exercise of this constitutional right to free speech. " 'Whatever is added to the field of libel is taken from the field of free debate.' "[19] Although the majority opinion acknowledges the importance of public criticism of elected officials, it undermines this recognition by granting only a conditional privilege to the statements in a recall application. "The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."[20] As we have said previously, "if critics of government, be they citizens or press, speak only at the risk of being prosecuted for libel or slander, few will criticize government at all."[21] The need for free and open debate concerning the performance of elected officials justifies granting absolute immunity to persons who seek the recall of a public official for misconduct in office.

Moreover, the ability to file a defamation action is not necessary to protect the public official from false facts alleged in a recall application in this state. Unlike many

---

[19] *New York Times v. Sullivan*, 376 U.S. 254, 272 (1963) (quoting *Sweeney v. Patterson*, 128 F2d 457, 458 (D.C. Cir.), cert. denied, 317 U.S. 678) (1942).

[20] *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (Black, J., concurring).

[21] *Cox Enterprises v. Carroll City/County Hospital Auth.*, 247 Ga. 39, 41 (273 SE2d 841) (1981).

states, the Georgia General Assembly has already provided for the punishment of persons who make false allegations. The recall statute requires both the petition chairperson and application circulator to sign an affidavit stating that the facts on which the grounds of recall are based are true.[22] A person who signs a false affidavit may be prosecuted for false swearing, a crime punishable by a fine up to $1,000 and a term of imprisonment of one to five years.[23] In addition, any person who gives or receives money for signing a recall application, induces or compels another person to sign a recall application, signs another person's name to the application, or signs his or her name more than once to the application is guilty of a misdemeanor.[24] Thus, the legislature has prescribed punishments that should deter false allegations.[25]

3. OCGA § 51-5-8 provides absolute immunity for allegations in court pleadings:

> All charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally

---

[22] OCGA § 21-4-5(b)(1)(E)(i).

[23] OCGA § 21-4-5(b)(1)(E)(ii).

[24] OCGA § 21-4-20.

[25] See generally Piper M. Willhite, Defamation Law: Privileges from Liability: Distinguishing Quasi-judicial Proceedings from Proceedings Which Are Preliminary to Judicial Hearings, 47 Okla. L. Rev. 541, 552-56, 569 (1994) (proposing an absolute privilege in quasi-judicial proceedings when communication is made under oath because "oath provides a safeguard from potentially false and defamatory statements").

> sufficient to obtain it or not, are privileged. However false and malicious such charges, allegations, and averments may be, they shall not be deemed libelous.

The appellate decisions in this state have not limited this absolute privilege to formal court pleadings, but rather have extended it to allegations in official documents in judicial and quasi-judicial proceedings.[26] Thus, the privilege has been applied to protect allegations in affidavits, protective orders prepared by counsel, and filings with the state employment agency.[27]

Like the parties in other judicial and quasi-judicial proceedings, the individuals who lead recall efforts are entitled to absolute immunity for factual allegations made under oath in recall applications that are challenged in superior court. The recall process is not merely a political procedure, as the majority opinion characterizes it. In its initial stages, the recall process is dominated by judicial review. Before leaders of recall efforts may even circulate recall petitions, a court must rule on the legal sufficiency of their application. Thus, while the voters ultimately determine the truth or falsity of the

---

[26] See *Williams v. Stepler*, 227 Ga. App. 591 (1997); *Rivers v. Goodson*, 188 Ga. App. 661 (373 SE2d 843) (1988) (testimony at FCC hearing presided over by an administrative law judge).

[27] See *Conley v. Key*, 98 Ga. 115, 117 (25 SE 914) (1896) (affidavits made in a judicial proceeding); *Watkins v. Laser/Print-Atlanta*, 183 Ga. App. 172 (358 SE2d 477) (1987) (affidavit in support of arrest warrant); *Williams v. Stepler*, 227 Ga. App. at 595 (protective order prepared for judge by attorney in child custody action); *Land v. Delta Airlines*, 147 Ga. App. 738 (250 SE2d 188) (1978) (employer's statements to and from Employment Security Agency of Georgia Department of Labor).

allegations set out in the application, their ability to make that decision is controlled by the courts. As a result, the recall procedure is both political and judicial in nature: voters recall elected officials subject to close judicial scrutiny.[28] Given that the courts are involved at the beginning of the recall process, the allegations in the recall applications are made under oath, and the applications are subject to substantive judicial review, the persons who prepare and sign the applications are entitled to absolute immunity under OCGA § 51-5-8.

---

[28] See Elizabeth E. Mack, The Use and Abuse of Recall: A Proposal for Legislative Recall Reform, 67 Neb. L. Rev. 617, 632, 634-37 (1988).

SUPREME COURT OF GEORGIA

Case No. S97G1113 Atlanta, February 23, 1998

The Honorable Supreme Court and pursuant to adjournment.

The following order was passed:

JAMES TRAVIS DAVIS et al. v. GLENN SHAVERS

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Fletcher, P.J., dissents.

[SEAL]

SUPREME COURT OF GEORGIA
Clerk's Office

Atlanta September 12, 1997

TO ALL COUNSEL:

Case No. S97C1113, JAMES TRAVIS DAVIS et al. v. GLENN SHAVERS

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Sears and Hines, JJ., dissent.

This case will be assigned to the NOVEMBER, 1997, oral argument calendar **automatically under Supreme Court Rule 50(2), as amended September 13, 1996**.

This Court is particularly concerned with the following issue or issues:

Whether allegations in a recall petition are conditionally or absolutely privileged?

Briefs should be submitted only on these points. See Supreme Court Rule 45.

Sincerely,

Sherie M. Welch, Clerk

BY: /s/ Lynn M. Stinchcomb

Court of Appeals

of the State of Georgia

ATLANTA, MARCH 17, 1997

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A96A2283

JAMES TRAVIS DAVIS ET AL V. GLENN SHAVERS

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

THIRD DIVISION
ANDREWS, C. J.,
POPE, P. J., SMITH, J.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

February 17, 1997

In the Court of Appeals of Georgia

A96A2283. DAVIS et al. v. SHAVERS. P-145

POPE, Presiding Judge.

Defendants James Travis Davis and Donald L. Shaw were members of a political group called "Citizens for Responsible Government," which filed certain recall applications against various officials of the City of Fort Oglethorpe, including plaintiff Glenn Shavers. A trial court found that the recall applications were legally insufficient, and that decision was affirmed by the Georgia Supreme Court in *Davis v. Shavers*, 263 Ga. 785 (439 SE2d 650) (1995). Thereafter, Shavers brought this action for libel against numerous members of the political group based upon statements made in the recall applications. After the defendants moved for summary judgment, twenty-one of the defendants were removed from the case, excluding Davis, who was chairperson of Citizens for Responsible Government and signed the applications, and Shaw, who initiated the process and presented the applications to the elections superintendent.

The case was tried against defendants Davis and Shaw, and verdicts in the amount of $40,362 were

returned against each of them. Defendants now appeal the judgment entered on the verdicts, raising six enumerations of error.

1. Defendants enumerate as error the trial court's refusal to grant their motion for judgment notwithstanding the verdict on the grounds that the allegations contained in the recall applications were absolutely privileged under the provisions of OCGA § 51-5-8. Specifically, defendants argue that Georgia's recall process, which is subject to limited judicial review, is a judicial or quasi-judicial proceeding, such that recall applications are, in effect, "pleading-type" documents whose contents are absolutely privileged to the same degree as court pleadings and other communications in civil proceedings.

Georgia law recognizes two different kinds of privileged communications: absolute and conditional. OCGA § 51-5-8 provides that "[a]ll charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However, false and malicious such charges, allegations, and averments may be, they shall not be deemed libelous." While this code section does not use the term "absolute," our courts have determined that OCGA § 51-5-8 confers an absolute privilege for statements made in judicial pleadings. *Wilson v. Sullivan*, 81 Ga. 238, 243-244 (7 SE 684) (1888). Absolute privilege means that there can never be any damages for such allegations. *Dixie Broadcasting Corp. v. Rivers*, 209 Ga. 98 (6a) (70 SE2d 734) (1952).

Certain other communications also are enumerated as privileged under Georgia law, including "[c]omments upon the acts of public men in their public capacity and with reference thereto." OCGA § 51-5-7 (8).[1] However, the privilege referred to in this code section is not absolute, rather it is conditional or qualified, requiring a showing of good faith and good intention as essential ingredients of the privilege. *Fedderwitz v. Lamb*, 195 Ga. 691, 692 (25 SE2d 414) (1943). See also *Elder v. Cardoso*, 205 Ga. App. 144, 147 (3) (421 SE2d 753) (1992). Thus, "[t]he characteristic feature of absolute, as distinguished from conditional privilege is, that in the former the question of malice is not open; all inquiry into good faith is closed." *Wilson v. Sullivan*, 81 Ga. at 243. In the latter, if actual or express malice is proven, the conditional privilege will be destroyed.

Therefore, the question that must be decided in this appeal is whether allegations made against an elected official in a recall application are absolutely privileged and afforded the same protection as allegations made in "regular pleadings filed in a court of competent jurisdiction," (OCGA § 51-5-8) or whether these allegations are only conditionally privileged and afforded the same protection given to "[c]omments upon the acts of public men in their public capacity and with reference thereto." (OCGA § 51-5-7 (8)).

---

[1] OCGA § 51-5-7 was amended subsequent to the filing of this action. The 1996 amendment redesignates subsection (8) as subsection (9) and adds the words "or public women" following the words "public men."

The Recall Act of 1989 (OCGA § 21-4-1 et seq.) sets out the process by which an elected official may be recalled. Under OCGA § 21-4-5, a recall is initiated by the filing of a recall application with the election superintendent that meets the requirements of OCGA § 21-4-5. Once a timely application has been filed, an elected official may seek judicial review "of the sufficiency of the ground or grounds for the recall and the fact or facts upon which such ground or grounds are based as set forth in such recall application." OCGA § 21-4-6 (a). However, OCGA § 21-4-6 (f) expressly limits the extent of judicial inquiry. Judicial review "shall be only for the determination of the *legal sufficiency of such alleged fact or facts as to form and not as to truth* and shall not include discovery or evidentiary hearings." (Emphasis supplied.) Thus, an elected official may only seek a judicial determination of the legal sufficiency of the form of the application, and judicial inquiry into the truth or falsity of the allegations contained in the application is expressly denied. See generally *Steele v. Honea*, 261 Ga. 644, 646-647 (409 SE2d 652) (1991).

Furthermore, the Recall Act of 1989 specifically denies an elected official the right to seek an evidentiary hearing where he or she could contest the truth of the accusations contained in a recall application and answer the charges, conduct discovery, call witnesses or present evidence in accordance with judicial procedures usually afforded litigants in a civil proceeding. The Act makes clear that the truth or falsity of the accusations against an elected official is to be determined by the electorate in a recall election without prior judicial review. *Collins v. Morris*, 263 Ga. 734, 737 (438 SE2d 896) (1994). Thus, even in cases where a recall application contains false and

malicious accusations, an elected official has no right under the Recall Act of 1989 to seek an evidentiary hearing to contest the substance of the charges prior to the recall election.

Under these circumstances, we decline to hold that allegations contained in a recall application against an elected official are absolutely privileged. " 'The great underlying principle upon which the doctrine of privileged communications rests is public policy. This is more especially the case with absolute privilege, where the interests and the necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution, for the sake of the public good. It rests upon the same necessity that requires the individual to surrender his personal rights, and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits." *Fedderwitz v. Lamb*, 195 Ga. at 696.

We do not see how extending the absolute privilege to allegations contained in recall applications in the manner alleged by defendants will serve the public good. To the contrary, we find that allowing false and malicious allegations against an elected official to go to the electorate with no consequences whatsoever to the defamer offends all notions of fair play and justice. OCGA § 21-4-6(f) affords an elected official no opportunity to contest false and malicious accusations in a judicial forum prior to a recall election, and we will not take away the official's only right to seek recourse against false and malicious accusations subsequent to a recall effort.

Accordingly, we follow the Georgia Supreme Court's path of restricting the class of absolute privilege "to narrow and well-defined limits," *Fedderwitz* 195 Ga. at 697, and hold that accusations made in recall applications are only conditionally privileged as "[c]omments upon the acts of public men in their public capacity and with reference thereto." OCGA § 51-5-7 (8). Accordingly, the trial court did not err in ruling that the allegations contained in the recall applications against Glenn Shavers were not absolutely privileged.

2. In light of our decision in Division 1 of this opinion, we hold that the trial court's failure to charge the jury on absolute privilege was not error.

3. Defendants also enumerate as error the trial court's charging the jury on common law malice and libel per se, and that trial court's failure to give three charges requested by defendants that would have further defined the elements of actual malice.

In order for a public official to prevail in a libel action, an official must establish that a defendant acted with actual malice, " 'that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' [Cit.]" *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49, 51 (230 SE2d 45) (1976). This means that the burden is on the public official to show that a defendant had knowledge of the falsity of an accusation or acted with reckless disregard. Actual or constitutional malice is different from common law malice because knowledge of falsity or reckless disregard of the truth may not be presumed nor derived solely from the language of the publication itself.

Id. at 56. "Reckless disregard requires clear and convincing proof that [a defendant] was aware of the likelihood he was circulating false information. [Cit.] Thus, it is not sufficient to measure reckless disregard by what a reasonably prudent man would have done under similar circumstances nor whether a reasonably prudent man would have conducted further investigation. The evidence must show in a clear and convincing manner that [a defendant] in fact entertained serious doubts as to the truth of his statements . . . [Cit.]" *Miller v. Woods,* 180 Ga. App. 486, 488 (349 SE2d 505) (1986).

In this case, the trial court first charged the jury on actual malice and the correct burden of proof. However, over defendants' objection, the trial court also charged the jury on common law malice (OCGA § 51-5-5) as follows: "I instruct you that in all actions for printed defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof." The trial court also instructed the jury that if they find the accusations of misconduct in office and malfeasance in office libelous per se, that the plaintiff was entitled to recover general damages. Therefore, the trial court's charge to the jury included both a charge on common law malice, a legal principle not applicable to this case, and actual malice, but did not explain the difference between the two or emphasize the importance of finding actual malice in this instance. The jury could have found actual malice under the first part of the charge, or inferred malice under the second part of the charge. "To give the jury a choice between common law malice and actual malice where the constitution requires that actual malice be shown is reversible error. *Greenbelt*

Cooperative Publishing Assoc. Inc. v. Bresler, 398 U.S. 6, 10, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970)." *Straw v. Chase Revel,* 813 F2d 356 (9) (11th Cir. 1987). Furthermore, " "[a] charge which confuses the issues in the case and injects into the case issues not made by the pleadings or the evidence is presumptively harmful to the losing party. (Cits.)' [Cit.]" *Southern Intermodal Logistics v. Coleman,* 175 Ga. App. 853, 854 (1) (334 SE2d 888) (1985). Therefore, we find the trial court's charge to the jury, when considered as a whole, constituted reversible error.

We also note that under the circumstances of this case, the trial court's refusal to give any of defendants' request to charge on actual malice constituted error. The only definition of "malice" contained in the trial court's charge was that "actual malice is defined as knowledge that the statement made was false or with reckless disregard of whether it was false or not." The trial court refused all of defendants' requests to charge that would have emphasized the elements of actual malice and clarified the conflicting charges on actual and common law malice. Specifically, the trial court refused to charge that a public official cannot recover unless he or she proves with clear and convincing evidence that the defendant knew his statement was false; that the ultimate proof of falsehood is not enough without the speaker's own personal knowledge or belief; that falsehood coupled with negligence is not enough; and that subjective awareness by the speaker must be shown – the test is not what a reasonable or ordinary person would think. These charges were correct statements of the law (see *Miller v. Woods,* 180 Ga. App. at 488; *Williams v. Trust Co.,* 140 Ga. App. at 51; *Heard v. Neighbor Newspapers,* 193 Ga. App.

719, 720 (389 SE2d 267) (1989)) and would have emphasized for the jury the importance of finding actual malice in this instance. "The charge as given by the trial court did not otherwise instruct the jury on these accurate and applicable legal principles. It follows that the trial court erred in refusing to give it." *Bank South v. Roswell Jeep Eagle,* 204 Ga. App. 432, 434 (2) (419 SE2d 522) (1992).

4. Defendants enumerate as error the trial court's failure to direct a verdict at the close of plaintiff's case on the grounds that plaintiff failed to establish that defendants acted with actual malice or reckless disregard. Defendants also enumerate as error the trial court's failure to direct a verdict on the grounds that plaintiff failed to establish damages.

We have reviewed the evidence and hold that the evidence of actual malice and damage were sufficient to be considered by the jury. Therefore, defendants' remaining enumerations of error are without merit.

Judgment reversed. Andrews, C. J., and Smith, J., concur.

IN THE SUPERIOR COURT FOR THE
COUNTY OF CATOOSA

STATE OF GEORGIA

GLENN SHAVERS, Plaintiff, -versus- JAMES TRAVIS DAVIS and DONALD L. SHAW, Defendants.	)	CIVIL ACTION NO. 94 CV 27,495

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT N.O.V. OR IN THE ALTERNATIVE FOR A NEW TRIAL

(Filed April 24, 1996)

The Defendants above have filed a Motion for Judgment N.O.V. and Motion for New Trial.

Both sides have submitted the issues to the Court based on briefs.

After considering the argument of counsel, it is the Order of this Court that the Motion for Judgment N.O.V. be *denied* and the Motion for New Trial be *denied*.

This 22 day of April, 1996.

/s/ Jon Bolling Wood
JON BOLLING WOOD
JUDGE OF SUPERIOR
COURT LMJC

[p. 154] IN THE SUPERIOR COURT OF CATOOSA COUNTY, GEORGIA AT RINGGOLD

GLENN SHAVERS, Plaintiff, -vs- JAMES TRAVIS DAVIS, et al, Defendants.	:	CIVIL ACTION NO. 94CV27,495

APPEARANCES:

FOR THE PLAINTIFF:

JOHN O. WIGGINS, ESQUIRE
WIGGINS AND WIGGINS
7723 NASHVILLE STREET
RINGGOLD, GEORGIA 30736

FOR THE DEFENDANTS:

LESLIE WAYCASTER, ESQUIRE
WAYCASTER, MORRIS, JOHNSON AND DEAN
130 WEST KING STREET
DALTON, GEORGIA 30720

SECOND DAY OF TRIAL

BE IT REMEMBERED, the above entitled cause on for hearing the 18th, 19th and 20th days of September, 1995, before the Honorable Jon B. Wood, Judge of the Superior Courts, Lookout Mountain Judicial Circuit, when the following proceedings were had and evidence introduced, to wit:

* * *

[p. 241] I mean, I think you made your point with it. I think it – I thought it would be erroneous to send a legal opinion out with the jury. But if you want to –

MR. WIGGINS: I'll be satisfied with that.

THE COURT: So it's withdrawn.

MR. WIGGINS: You stipulated on the Supreme Court decision, I believe, and I'm satisfied with that.

THE COURT: That's already been announced.

MR. WIGGINS: I'm satisfied with that.

THE COURT: All right. P-15 is withdrawn. Okay. Mr. Waycaster, go ahead.

MR. WAYCASTER: Your Honor, I have – at this time I would like to make a motion for directed verdict. And there's three or four different points to cover.

First off, I believe that the evidence shows that the basis for the libel in this case is the language that is included in the application for recall and that alone. It is our position that the language in that recall petition is absolutely privileged and as such cannot be the basis of a libel action.

We argue that because there are statutes in the [p. 242] State of Georgia, 51-5-8 deals with pleadings, Code Section 51-5-8 talks about pleadings being absolutely privileged. 51-5-7 talks about or gives authority to discuss official acts by government officials, and 51-5-8 talks about pleadings and judicial proceedings. And any pleading filed in a judicial proceeding is considered to be

absolutely privileged, if you look at the opinions that construe the recall petitions. And the recall petition process is a statutorily approved process, just like filing court pleadings are. And if you look at the opinions that have ruled on recall petitions, they are simply looking at the legal sufficiency of the recall petition. They do not – or the Courts do not look at the truth or the truthfulness of the facts contained in those petitions.

It's my contention that the reason they don't do that is because that language is absolutely privileged. The Recall Act gives the subject or the target of recall an opportunity to seek judicial review of the recall before it goes forward. Anything filed in those pleadings gone forward is going to be privileged. Insofar as the Recall Act gives them that right of judicial review and insofar [p. 243] as the Recall Act is a statutory creation and has set guidelines for the documents that are necessary to carry out the recall, necessarily the language contained in those recall petitions must be absolutely privileged.

The case of Hamlet versus Hubbard is one of the cases that talks about the review of a recall application. And in Footnote One of that case they specifically talk about the fact that the review is not on the merits of the case. The reason for that, I argue, is because they consider it to be privileged. Along with that, I don't think that the printing of words in a recall application satisfies the definition of publication for purposes of libel just as allegations in pleadings do not satisfy the definition of publication for libel. I think those things are one in the same.

If the Court, however, determines that the allegations or statements made in the recall petition are only conditionally privileged, then the next step is whether or not they have proven – the plaintiffs have proven the existence of actual malice by clear and convincing evidence because of the fact that you have a public official to overcome that.

[p. 244] In this case I think the Court has to split. I think if you look at either one of the defendants, you have to look at them separately. There is no evidence of actual malice on the part of Don Shaw and the only evidence that has been put in with regard to actual malice on the part of Travis Davis is the discussion about recklessness. Recklessness only becomes the basis for actual malice if you show that the person who had that belief did not have a good faith belief that the allegations were true.

There is a case Rosa Nova versus Playboy Enterprises. It's a Federal Supplement case and it says that the test is one of subjectivity.

Mr. Davis' testimony was that based upon what Don Shaw told him, based upon what his attorney told him, even though he didn't do the investigation and even though he said that may be somewhat reckless at the time he signed them, he believed those allegations to be true. There is no evidence regarding Don Shaw, so if it's not absolutely privileged and you get to the issue of conditional privilege, you have to prove actual malice. And to prove actual malice, if you're going to use recklessness, then they have to show that he did not [p. 245] have a

good faith subjective belief about the truthfulness of the statement and they haven't proven that.

Lastly, I understand and acknowledge that in a libel case the standard of review of or damages is the enlightened conscious [sic] of the jury. But there is also a stopping point between enlightened conscious [sic] and speculativeness. There is no evidence other than the fact that Mr. Shavers and his family members somehow feel differently about their reputation. And I don't know how to explain this other than to tell the Court some things we don't have.

But, for example, if you have somebody in a business and one of their competitors goes and tells a potential customer or an actual customer bad things or untruthful things about them, they lose business, and that's something the Court can look at as to the value of that deal and the value of that transaction. You don't have that here. You don't have any testimony from any witness that they think any differently about Glenn Shavers today than they did before.

You don't even have any statement that could be looked upon as any difference of opinion between [p. 246] what happened before and after. Some of the other little things that go along with that, they talk about restlessness and things of that nature. At some point the Court has got to determine what is speculativeness, and there is absolutely no basis for the Court to hang its hat that there has been any damage because libel, if this were a personal injury case, then the Court wouldn't have to rely upon necessarily some third person coming in and saying, yes, I think less of Glenn Shavers because of this.

But libel necessarily requires the publication to the third person. There has been no third person brought in here that can say that it has affected them negatively towards Glenn Shavers. And I think on any one of those points the Judge ought to grant our motion.

THE COURT: Mr. Wiggins?

MR. WIGGINS: Thank you. I don't know, let me say first that when you consider the recall law, the Recall Act of 1989, and what the procedure for that particular law is, it certainly militates against a finding that an application for recall is equivalent to a pleading filed in the court of law.

And the reason I say that, Your Honor – and again, Leslie is right about something, but I think [p. 247] what he's right about cuts in our favor. If you file a document in this court, if you file a pleading in the court, as some point you're going to have an opportunity – well, first of all, a defendant has an opportunity to file an answer and deny it. And more importantly than that, that party has an opportunity to come to court and disprove it. And that is why – and I agree that pleadings and court should be absolutely privileged – but an application for recall and under the procedure and under the law of the Recall Act, this judicial inquiry is very limited. And it is so limited that not only can Mr. Shavers not present any evidence whatsoever; he can't even question the truthfulness of these allegations.

And so it would seem to me that when you consider the procedure that is employed by the Recall Act of 1989, it certainly militates against a finding that one of these applications is tantamount to a judicial pleading. And

there is no question and never has been any question but what in order to prevail, Judge Shavers has to show actual malice. That, I respectfully submit, is a question for the jury.

There are cases, one a Georgia Supreme Court, [p. 248] says that the publication of a false statement which tends to injure the reputation of another and expose him to public hatred, contempt and ridicule will be presumed to be malicious. There is a presumption there.

And in one case Mr. Waycaster cited to the Court, Rosa Nova versus Playboy Enterprises, holds that the burden of rebutting the presumption of malice lies with the defendant. In a libel case special damages need be neither alleged nor proven. The injury in a libel case is the injury to the reputation, and there need be no allegation or any proof whatsoever of special or monetary damages.

Publication, he says that there is no possible indication. The evidence has shown there are 362 people that signed this application for recall. There is Georgia authority that holds that every publication of a libelous matter is a separate cause of action.

In effect, Judge Shavers had 362 separate causes of action here. Publication is defined that any time that a libel is communicated to anyone other than the person that is libeled. Here we have 362 different people, not to mention all of the people that saw it in the paper or heard it over the [p. 249] television. There is absolutely no telling how many thousands of people, how many thousands of publications that has been.

But publication is precisely defined by statute in Georgia, and it precisely states that any time it's communicated to anyone other than the person to whom the libel is directed, it is communicated, it is a publication. And we think the evidence has shown plenty of publication. We think there is enough evidence for the jury to find – and incidentally, this was the same matter that was addressed by Judge Wood on the motion for summary judgment.

THE COURT: Judge Hill.

MR. WIGGINS: I'm sorry, Judge Hill on the motion for summary judgment. And a very reason had been that he took a lot of time and did a lot of research. He held that it was a question for the jury, and we respectfully submit that there is plenty enough to send this case to the jury.

THE COURT: Go ahead, Mr. Waycaster.

MR. WAYCASTER: A couple of responses. As the Court is aware, the standard for a motion for summary judgment is different than the standard on a motion for directed verdict. On the summary [p. 250] judgment I have the burden of disproving everything out there, and here they have to prove enough to get to the jury. It is different.

But I think that the basis for the argument and the fact that these statements are absolutely privileged is because privilege goes hand-in-hand with the First Amendment Right of free speech in certain statutorily approved procedures is what we have here, just like you

would in court proceedings in a similar situation involving quasi-judicial proceedings. The Georgia Supreme Court has discussed this in the case of Fedderwitz, F-E-D-D-E-R-W-I-T-Z, versus Lamb, and I provided the Court with a copy of that opinion for your review, as well.

The last point I would like to make on this is, even if the Court goes on absolute privilege and gets to conditional privilege and looks at the issue of actual malice, there is no evidence that Don Shaw has committed – had actual malice towards Mr. Shavers.

There is no evidence that Mr. Davis had a subjective good faith belief that the statements were untrue, and without that they haven't met the burden of proving actual malice, which they have to [p. 251] prove by clear and convincing evidence in this case.

THE COURT: Has Judge Hill's orders been filed? This is a thick file. Has it been located?

MR. WIGGINS: Yes, I have got it.

THE COURT: The reason I'm asking you, Mr. Waycaster, I agree with you in the difference between a motion for summary judgment and a motion for directed verdict. But I think on the issue of whether the recall petition qualifies under 51-5-8 for an absolute privilege would be something that really wouldn't change. I mean the Exhibit D-11 remains the same now as it did when the motion for summary judgment was filed.

MR. WAYCASTER: That part is true.

THE COURT: I want to see if he ruled on that issue.

MR. WAYCASTER: I don't think he discussed that, but I haven't read it in the last few days.

THE COURT: I don't see any specific mention in here. Let me read this one case real quick, and I think I can rule.

(Brief pause.)

THE COURT: Well, I need to spend more time than we have right now to read this case.

MR. WIGGINS: What case is that?

[p. 252] THE COURT: Fedderwitz, F-E-D-D-E-R-W-I-T-Z, versus Lamb. The cite is 195 Georgia 691. It is a 1943 opinion.

Okay. Let's be back at 1:15. And Betty, we may not be ready for the jury right then, but that's when I told them to come back.

One fifteen.

(Whereupon, the lunch recess was had.)

AFTERNOON SESSION

(Whereupon, pursuant to the lunch recess, the following proceedings were had in open court out of the presence of the jury.)

THE COURT: Okay. The jury is still out, so I can rule on this motion for directed verdict. I'm going to deny the motion. I reviewed the case that was presented shortly before we took our lunch break, and I just wanted to do that to satisfy my own mind. So I'm going to deny

the motion. I do not feel that the absolute privilege outlined in 51-5-8 applies to this particular case. And whether a conditional privilege applies and whether malice is shown are jury questions, so we're going to let

* * *

21-4-5. Recall petition – Application for and time of filing; sponsors; withdrawal of signature; duties of election superintendent; printing and distribution of recall petition forms by Secretary of State.

(a) No application for a recall petition may be filed during the first 180 days or during the last 180 days of the term of office of any public official subject to recall. No person shall be authorized to circulate, sponsor, or sign such application unless such person is an elector or sponsor as defined in Code Section 21-4-3.

(b)(1) The Application shall include:

(A) The name and office of the person sought to be recalled;

(B) The printed names and signatures of the official sponsors, the date signed, residence addresses, and the name of the county of residence;

(C) The designation of one of the sponsors as the petition chairperson who shall represent the sponsors on all matters pertaining to the recall application and petition;

(D) A statement that: _____ (name and office) has, while holding public office, conducted himself or herself in a manner which relates to and adversely affects the administration of his or her office and adversely affects the rights and interest of the public and stating the appropriate ground or grounds for recall as set forth in subparagraph (B) of paragraph (7) of Code Section 21-4-3 with a brief statement of the fact or facts

upon which the ground or grounds are based. Such statement shall be typed, printed, or reproduced by the election superintendent on the face of each application issued; and

(E)(i) An affidavit by the petition chairperson and the person circulating such recall application that each person sponsoring or signing such recall application is an elector of the electoral district of the officer sought to be recalled and that the fact or facts upon which the ground or grounds for recall are based are true.

(ii) The affidavit required by division (i) of this subparagraph shall be in the following form:

AFFIDAVIT OF CIRCULATOR AND PETITION CHAIRPERSON

State of Georgia

County of _____

Under the penalty of a violation of Code Section 16-10-71 of the Official Code of Georgia Annotated, relating to false swearing, punishable by a fine not to exceed $1,000.00 or by imprisonment of not less than one nor more than five years, or both, we the undersigned do depose and say that each person sponsoring or signing the recall application of _____ is an elector of the electoral district of the officer sought to be recalled and further depose and say that the fact or facts upon which the ground or grounds for recall are based are true.

_____
(Signature of circulator)

_____
(Residence address)
(Number and street or route)

_____
(City)

_____
(Signature of petition chairperson)

_____
(Residence address)
(Number and street or route)

_____
(City)

Subscribed and sworn to
before me this ___
day of ___, 19___.

_____
Notary public
_____, Georgia

My commission expires on the ___ day of ___, 19___.

(2) Applications shall be issued by the election superintendent who shall assign a number to each application. Such number shall appear on the face of each application. The election superintendent shall keep records of applications issued, including the date of issuance and number assigned. The election superintendent shall immediately notify in writing the public officer named for recall in the application that an application for a recall petition has been officially issued for circulation.

(3) The official application forms shall be printed by the office of the Secretary of State in substantially the form prescribe in this subsection and distributed to election superintendents.

(c) The number of official sponsors necessary to file an application for a recall petition must be equal in number to at least 100 electors or equal in number to at least 10 percent of the number of electors who were registered to vote at the last preceding general election for any of the candidates offering for the office held by the public official sought to be recalled, whichever is smaller.

(d) Sponsors of a recall petition, before causing the petition to be circulated, shall submit the application for the petition to the election superintendent designated in Code Section 21-4-3 and request official recall petition forms.

(e) At any time prior to the date the election superintendent receives the application for a recall petition, an elector who has signed the application as an official sponsor may request withdrawal of his or her signature from the application by executing and filing an affidavit signed and sworn to before a notary public which affirms the elector's intention to withdraw his or her signature from the application. The official affidavit of signature withdrawal shall be printed by the office of the Secretary of State and distributed to election superintendents. The form of the affidavit shall be substantially as prescribed in Code Section 21-4-9.

(f)(1) No application for a recall petition shall be accepted for verification if more than 15 days have elapsed since the application forms were issued to the sponsors. If an application for a recall petition contains more than one sheet, such application, when offered for filing, shall be bound together and each sheet shall be numbered consecutively at the foot of each page beginning with page one.

(2) On receipt of the application, the election superintendent shall file the application and proceed to determine the legal sufficiency of the application and determine if the signers are qualified electors eligible to sign the application. The election superintendent is granted unrestricted authority to examine the registration records maintained by the board of registrars, to receive evidence and testimony, and to require the personal appearance of any person signing such application for the purpose of making such determination. If the election superintendent finds that any signer is not a qualified elector eligible to sign the application, such signature shall not be counted in determining whether the application contains a sufficient number of signatures as required by law. The nullification of a signature on an application shall not affect the validity of other signatures contained in such application. The election superintendent shall certify the legal sufficiency or insufficiency of the application for a recall petition within five days after receiving the application, excluding Saturdays, Sundays, and legal holidays; provided, however, that the judge of the superior court may, upon proper application and good cause shown, grant an additional period of time not

to exceed 15 days for the election superintendent to verify the application.

(3) The election superintendent shall immediately notify in writing the public officer named for recall in the application that a completed application for a recall petition has been filed with the election superintendent for verification.

(g) No application for a recall petition shall be amended, supplemented, or returned after it has been filed with the election superintendent for verification.

(h) Upon certifying the legal sufficiency of the application, the election superintendent shall immediately officially file the certification of the application, issue official recall petition forms, assign a number to the recall petition, which number shall appear on the face of each petition form, and issue that number to the sponsors. A record of each application, including the date of its receipt and the number assigned and issued to the sponsors, shall be maintained by the election superintendent.

(i) The election superintendent shall immediately notify in writing the public officer named for recall in the application that a recall petition has been officially issued for circulation.

(j) The official recall petition forms shall be printed by the office of the Secretary of State and distributed to election superintendents. The form of the petition shall be as provided in Code Section 21-4-7. (Code 1981, § 21-4-5, enacted by Ga. L. 1989, p. 1721, § 1; Ga. L. 1990, p. 1939, §§ 2-4.)

21-4-6. Review of grounds for recall petition.

(a) Within four days after the date of submission of the application for a recall petition for verification, excluding Saturdays, Sundays, and legal holidays, the officer sought to be recalled may file a petition in the superior court of the county in which such officer is domiciled applying for a review of the sufficiency of the ground or grounds for their recall and the fact or facts upon which such ground or ground are based as set forth in such recall application.

(b) The superior court having jurisdiction of a case governed by this chapter shall be presided over by a superior court judge or senior judge. The superior court judge or senior judge who presides over the case shall be selected as set out in subsection (c) of this Code section.

(c) Upon the filing of a sufficiency review petition under this Code section, the clerk of superior court having jurisdiction shall immediately notify the administrative judge for the judicial administrative district in which that county lies, or the district court administrator, who shall immediately notify the administrative judge of the institution of proceedings under this chapter. If the county in which the proceedings were instituted is not in the circuit of the administrative judge, the administrative judge shall select a superior court judge from within the district, but not from the circuit in which the proceeding was instituted, or a senior judge who is not a resident of the circuit in which the proceeding was instituted, to preside over the contest.

(d) If the administrative judge is a member of the circuit in which the proceeding was filed, or if the other

judges of the district are unable or are unwilling to preside over the proceeding, or if the other judges of the district are judges of the circuit in which the proceeding was filed, then the administrative judge shall select an administrative judge of an adjoining district to select a superior court judge from that district, or a superior court judge from the district in which the proceeding was filed, but not the circuit in which the proceeding was filed, or a senior judge who is not a resident of the circuit wherein the proceeding was filed.

(e) After a judge has agreed to preside over the case, the administrative judge who selected the judge to hear the matter shall enter an order in the superior court of the county where the proceeding was filed appointing such judge, and such judge shall promptly begin presiding over such proceedings in such court and shall determine same as soon as practicable. Such judge shall be reimbursed for his actual expenses for food and lodging and shall receive the same mileage as any other state officials and employees. Senior judges shall be entitled to compensation and reimbursement as the law provides for senior judge service.

(f) Such review shall be limited solely to a review of the legal sufficiency of the recall ground or grounds and the legal sufficiency of the alleged fact or facts upon which such ground or grounds are based as set forth in such recall application; and the review of such alleged fact or facts shall be only for the determination of the legal sufficiency of such alleged fact or facts as to form and not as to truth and shall not include discovery or evidentiary hearings.

(g) If a ruling of sufficiency is rendered by such judge, then recall proceedings shall continue in the manner provided for in this chapter. If a ruling of insufficiency is rendered by such judge, then a discretionary appeal may be filed in the Supreme Court of Georgia within ten days after the date of such ruling, excluding Saturdays, Sundays, and legal holidays, and such court shall consider such appeal on an expedited basis. (Code 1981, § 21-4-6, enacted by Ga. L. 1989, p. 1721, § 1; Ga. L. 1990, p. 1939, §§ 5, 6; Ga. L. 1991, p. 608, § 3.)